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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 930

PAULYNE B. MCCALL, as the Administratrix of the Estate of VIRGIL C. MCCALL, Deceased, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

(EDGAR) HORTON SMITH
Counsel for Petitioner

ROCKY V. LINDELL
RICHARD F. KRUTCH
ALLEN LANE CARR
PAUL M. POLIAK
Of Counsel for Petitioner

Office and Post Office Address:
1480 Dexter Horton Building
Seattle, Washington 98104

THE ARGUS PRESS SEATTLE, WASHINGTON

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REPLY TO BRIEF FOR THE UNITED STATES

The government in its question presented on page 2 of their brief conveniently omits the most significant facts, that the serviceman employee was traveling pursuant to standard transfer orders and was a servant proceeding without deviation from his master's orders. These are facts found by the district court (Pet. App. A-32).

Reply to Statement of the Case by the United States

On page 4 the government in its reference to the "SWAP" program of the Navy neglected the fact that there was no other manner for an employee under that program to travel other than to be in a leave status (RII-193) and it should be remembered that the government through its appropriate supervisors of said employee gave a *positive recommendation* as to the

benefit to the government and to the *desirability of the exchange by endorsement on his request* (Ex. A-2) (RI-73).

It should further be borne in mind that the employee Grantham was at all times subject to the Uniform Code of Military Justice (Finding 36, Pet. App. A-24) and he knew it (RII-12) and he knew that he had to obey such orders once he logged off his ship (RII-17).

Reply to Government's Argument

The fact of whether or not Grantham was not within the scope of his employment because "the driving of an automobile by Grantham was not the kind of work that he was employed by the United States to perform nor required by his contract of employment nor by the direction of the United States" (Pet. App. A-39) pointed out by the United States on page 5 are erroneous conclusions by reason of the employment contract of the employee (Pet. App. A-16) and there was *in fact* a direction specifically authorizing the use of Grantham's own automobile (Finding 24, Pet. App. A-22) even though the trial court found it contrary to the government regulations involved in the Bureau of Naval Personnel Manual, Article C-5317 (3) (B) to enlisted personnel in their travel by privately owned conveyances which requires that the permanent change of station orders or endorsements by specifically authorized travel by a privately owned vehicle (RII-201 and RI-19, 10 and Ex. 1 RI-71). The orders complied with this requirement. It should be remembered that these regulations by the Bureau of Personnel take precedence and are a more authoritative regulation or rule and have

the same force and effect as orders issued by the Chief of Naval Personnel (RI-6), and that the Enlisted Transfer Manual is merely a publication supplementing basic regulations and instructions in the nature of an administrative guide (RI-11 and the testimony of Capt. Robe, USN RII-201). *Such specific authorization may have been superfluous but it was in fact given and obeyed!*

This narrow limiting of the driving of an automobile to the situation where a serviceman is employed to be a driver is not found in any of the Washington cases. Especially it is not found in the principal Washington case, *Green v. St. Paul Mercury Indemnity Company,* 51 Wn.(2d) 569, 573, 320 P.(2d) 311, 314 (1958) which emphasizes stringently that *any* of the following, to-wit: (a) Duties by contract of employment; (b) or specific direction of employer; (c) or engaged in furthering an employer's interest; are sufficient to result in respondeat superior liability. In this case particularly, the interests of the government were met through the exchange nature which the United States conveniently forgets as to the benefit to Pedro Dela Cruz and his family and his continued interest in the United States Navy in reaching the Philippines and the saving to government in retention and retraining costs which have been of Congressional concern. (Pet. App. 6, A-12).

The "dual purpose" and the "predominate motive" rules are conveniently overlooked in the government's brief as are the Washington long distance transfer cases (Pet. App. pp. 11-16).

Lastly, this court has wisely stated:

> "A master must be taken to foresee that sooner or later a servant driving a motor vehicle will be likely to have a collision in which an injury may have held to have been due to his negligence, whatever care has been used in the employment of the man." *Panama Railway Co. v. Bosse*, 249 U.S. 41, 39 S.Ct. 211, 63 L.Ed. 466.

Let not the purpose of the Federal Tort Claims Act be frustrated and leave a penniless widow and six minor children without a remedy as they have been in this case.

Respectfully submitted,

(Edgar) Horton Smith
Counsel for Petitioner

Rocky V. Lindell
Richard F. Krutch
Allen Lane Carr
Paul M. Poliak
Of Counsel for Petitioner

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Seattle, Washington 98104